hold for an unascertainable body of beneficiaries would permanently suspend the power of alienation.

The problem of chancery jurisdiction over anomalous gifts to uses—not private trusts for lack of definite beneficiaries, not charities, because confined to a class in the community—should not be impossible of solution in view of a very respectable array of authority to the effect that the testator's wishes will be effectuated, the trustees being willing, to the exclusion of the heirs and personal representatives. See "Failure of the Tilden Trust." 5 Harvard Law Rev. 389.

IMPAIRMENT OF CONTRACT OBLIGATION BY CHANGE OF DECISION BY STATE COURT.—Two recent cases bring up a point upon which there has been considerable confusion in the holdings of the United States Supreme Court. *Board* v. *Gardner Savings Institute* (1902) 119 Fed. 36; *Mobile Trans. Co.* v. *Mobile* (1903) 23 Sup. Ct. Rep. 170. A discussion of the cases presents the question as to when the decision of a State Court will be considered by the United States Supreme Court to impair the obligation of a contract, so as to violate the constitutional provision on that subject.

This note does not consider the case where the State Court holds that a statute does not create any contract obligation, for in that event it is well settled since the case of *Jefferson Branch Bank* v. *Skelly* (1861) 1 Black 437, that the United States Supreme Court will examine the statute for itself and decide whether a contract obligation was created under it or not.

That part of the Constitution here concerned reads, "No State shall * * * *pass* any * * * *Law* impairing the Obligation of Contracts." The case here considered is one in which the State Court holds at one time a statute to be constitutional, and thereafter holds the same statute to be unconstitutional, or decides that not to be law which has been previously held to be law. And it is sought to find when the United States Supreme Court will, as to contracts made under the first decision, treat such a change of decision as a violation of the Constitutional prohibition.

The earliest case in which this question is much discussed is *Rowan* v. *Runnels* (1847) 5 How. 134. In that case the United States Supreme Court, in accordance with its view of the law of Mississippi at that time, had decided a certain class of contracts to be valid. The Supreme Court of Mississippi subsequently held such contracts to be illegal. A suit was brought in the United States District Court in Mississippi on one of these contracts which the Mississippi Court had at that time declared to be illegal, and the Supreme Court held that the District Court should apply the law as it understood it to be at the time the contract was made. The reason given was that to hold otherwise would be to give the decision of the Mississippi Court a retroactive effect. This decision was followed in *Gelpcke* v. *City of Dubuque* (1863) 1 Wall. 175, and also in *Douglas* v. *County of Pike* (1879) 101 U. S. 677, in which case it was said "where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the later decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."

These cases have been consistently followed in all cases coming before the Supreme Court on writ of error to the federal courts. *Olcott* v. *Supervisors* (1872) 16 Wall. 678; *Loeb* v. *Trustees* (1900) 179 U. S. 472.

The same case that was presented to the Supreme Court in *Gelpcke* v. *City of Dubuque*, *supra*, came before the Supreme Court on a writ of error to the Supreme Court of Iowa in *R. R. Co.* v. *McClure* (1870) 10 Wall. 511, and it was held that the decision of the Iowa Court was not the passing of a law, and so though the decision might impair the obligation of a contract, the United States Supreme Court had no jurisdiction. In accordance with this decision it has been laid down in many subsequent cases that the prohibition upon the State passing a law impairing the obligation of a contract has reference only to constitutional amendments and legislative enactments, and does not refer to the judicial decisions of the State courts. *Knox* v. *Exchange Bank* (1870) 12 Wall. 379; *Central Land Co.* v. *Laidley* (1894) 159 U. S. 103; *Bacon* v. *Texas* (1895) 163 U. S. 207.

The different result reached in cases coming before the Supreme Court on writ of error to the federal courts from that reached in cases coming up on writ of error to the State courts, can only be explained on the theory that the federal courts in this class of cases exercise an independent jurisdiction co-ordinate with that of the State courts. This position seems to represent the later tendency of the Supreme Court decisions.

There is another class of cases very similar to *R. R. Co.* v. *McClure*, which the Supreme Court will review on a writ of error to the State Court. That is the class of cases where a second statute is passed which it is claimed impairs an existing contract obligation, and the State Court decides the statute under which the contract obligation is claimed to arise to be unconstitutional, and therefore that no contract obligation is impaired by the subsequent statute. In such a case the Supreme Court has carried the principle of *Jefferson Branch Bank* v. *Skelly*, *supra*, a step farther, and holds that the Supreme Court will review the construction of the State Constitution by the State Court, and decide for itself whether the original statute is constitutional or not. *Louisiana* v. *Pilsbury* (1881) 105 U. S. 278; *Mobile & Ohio R. R.* v. *Tennessee* (1893) 153 U. S. 486; *McCullogh* v. *Virginia* (1898) 172 U. S. 116.

In the latter case the Supreme Court of Virginia, after years of litigation during which the statute had been passed upon by the United States Supreme Court and declared to be valid, held the statute to be unconstitutional. Subsequent to the passage of the statute claimed to create the contract obligation, an act was passed which would have impaired the contract obligation claimed, if such obligation was in existence. The United States Supreme Court held that this decision was a violation of the Constitutional prohibition. The reasoning was as follows. Since the subsequent act had the same result, whether its effect was to deprive the plaintiff of a certain right assured to him under a valid contract, or whether he was deprived of his enjoyment of the right claimed because it was held that he had no contract, in either case the plaintiff is deprived of the enjoyment of a privilege, and therefore by the decision of the State Court the

subsequent act is given effect and the contract is impaired by the passing of the subsequent act. The difficulty with the reasoning is that if the statute was unconstitutional, the Legislature had no power to make the contract, and there is no contract obligation to be impaired.

If the Court could go as far as it did in this case to find an act which can be called "passing a law," they could well have gone still further. As a practical matter it does not seem to be open to argument that the same result is produced upon contracts made upon the faith of a former decision by a change of decision, as is produced by the repeal of a law by which contract obligations are created. It would not be impossible to construe the words of Article I, Section 10, to include a change of judicial decision. It might be said that the passing of a law consists in the passing of a statute plus the the judicial construction of it, and that each change of decision results in the passing of a new law. The logic of the last suggestion is not very convincing, but it might justify the enlarged construction if any justification were necessary. The question is purely one of construction and policy.

The objection to such an enlarged construction is that the State courts would be deprived of almost all their final jurisdiction in cases involving a contract right, and the United States Supreme Court would be flooded with such a mass of litigation that the Court as at present constituted could never handle it.

FAILURE TO GIVE NOTICE OF INTENTION TO EXCAVATE.—In *Davis* v. *Summerfield et ux.* (N. Car. 1902) 42 S. W. 818, it was held that the defendant's failure to notify the owner of the adjacent lot of the extent of his proposed plan of excavation amounted to negligence and rendered him liable for the resulting injury to the plaintiff's house.

That the so-called natural right to lateral support exists only in favor of land in its natural state, and does not extend to the support of buildings erected upon it, is stated broadly by all the text writers. The statement as an absolute rule of law, however, would be erroneous. For to say that A owes B no duty whatsoever to protect the buildings which B has placed on the confines of his land, is to say that A is protected in any excavation he may choose to make even though he act with a total disregard for the damage that may accrue to B's buildings. It would seem that the true test should be what is a reasonable user by A and B, each considering the circumstances of the other. If it is not unreasonable for A to improve his land by building on it, even though he thereby increases the lateral pressure on B's land, then it is not unreasonable to require B to use due care in excavating. Accordingly we find the rule that one landowner does not owe his neighbor any support for the extra weight of superstructures on his land, qualified by the statement that if the lateral support is "negligently" withdrawn from land encumbered with buildings, a liability arises. *Dodd* v. *Holme* (1834) 1 Ad. & El. 493; *Austin* v. *H. R. R. Co.* (1862) 25 N. Y. 334; *Shafer* v. *Wilson* (1875) 44 Md. 268. Just how much care must be exercised is not clearly stated in any of the cases. The one excavating need not use the same degree